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IN THE

Supreme Court of the United States

October Term, 1955

No. 110

HAROLD I. CAMMER,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinions of the Court of Appeals (R. 27-41) are reported at 223 F. 2d 322. The memorandum opinion in the District Court (R. 25-26) is reported at 122 F. Supp. 388.

Jurisdiction

The judgment of the Court of Appeal was entered on May 5, 1955 (R. 42). The petition for a writ of certiorari was granted on October 10, 1955 (R. 42). This Court has jurisdiction under 28 U. S. C., Section 1254(1).

Statute Involved

18 U. S. C. § 401(2):

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion,

such contempt of its authority, and none other, as * * *

"(2) Misbehavior of any of its officers in their official transactions; * * *"

Questions Presented

1. Whether it is "misbehavior" constituting criminal contempt for an attorney, relying upon recent and direct precedent, in preparation for a pretrial challenge to the qualifications of grand jurors who had returned the indictment (a majority of whom were government employees), to address to such employees, after they had returned the indictment but before they had been discharged, a questionnaire designed solely to ascertain the effect of the loyalty and security programs upon their ability to act impartially in a case involving issues of communism.

2. Whether such conduct was in an "official transaction" within the meaning of the statute.

3. Whether the petitioner could be adjudged in criminal contempt where the District Court found that "it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in conscious wrong," and where it made no finding that petitioner intended to obstruct or did obstruct justice or that he was guilty beyond a reasonable doubt.

Statement of the Case

On June 15, 1954, petitioner was convicted in the United States District Court for the District of Columbia of criminal contempt for misbehavior in an official transaction as an officer of the court in violation of 18 U. S. C. 401(2). The proceeding had been instituted by an order to show cause issued on petition of the United States Attorney

(R. 1-7). Petitioner filed a verified answer (R. 7-13) There being no dispute as to the facts, the case was decided on the pleadings by the District Court, which sat without a jury.

The facts giving rise to the conviction are as follows: Petitioner was defense attorney in *United States* v. *Gold* (Crim. No. 1344-53, D. C., D. Col.) in which Gold was charged with having filed a false non-Communist affidavit under the Taft-Hartley Act.

A majority on the grand jury which had returned the Gold indictment were government employees. Petitioner undertook to prepare a pre-trial motion for a hearing as to the ability of these employees to act impartially, in view of the loyalty and security programs, in a case involving official charges of communism.

In the light of the decisions of this Court in *United States* v. *Wood*, 299 U. S. 123, *Dennis* v. *United States*, 339 U. S. 162, 171-2, and *Frazier* v. *United States*, 335 U. S. 497, petitioner was faced with the necessity of ascertaining the existence of bias in the particular case beyond the mere fact of government employment. As the basis for his contemplated motion petitioner therefore sent to the government employees on the grand jury a letter and questionnaire (R. 3-6) concerning the effect of the loyalty and security programs upon their ability to act impartially in such a case. *Cf. Morford* v. *United States*, 339 U. S. 258; *Dennis* v. *United States*, 339 U. S. 162, 170, note 4.

The letter was on petitioner's letter-head and over his signature and contained a self-addressed stamped return envelope. It did not refer to the facts or merits of the *Gold* case in any way, nor did it contain any suggestion of criticism of the grand jurors. It was copied verbatim, except for names, from a letter which was then on file in the District Court in another, unrelated case which had involved a similar issue (*United States* v. *Weinberg*, Crimi-

No. 829-52, D. C., D. Col.). From his study of the *Weinberg* case, petitioner had learned that in that case a motion for a hearing on the qualifications of government-employed grand jurors had been denied by a judge of the District Court for the District of Columbia, because Weinberg's counsel had failed, before moving for a hearing, to "contact" the grand jurors to ascertain whether actual bias existed (R. 13-15); that Weinberg's counsel, Joseph A. Fanelli, a member of the District bar, had thereupon sent an identical letter and a similar questionnaire to the grand jurors without the prior knowledge or authority of the Court (R. 15-18); that Mr. Fanelli had then presented them in support of a renewed motion for a hearing, and that he had not been criticized by either the government or the court.[1]

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[1] Mr. Fanelli had received no replies to the questionnaire and had presented this as a reason for invoking the assistance of the court through a hearing. Judge Holtzoff denied the application saying that:

> "Let's look at your questionnaire. Personally, if I were a Grand Juror, I would consider it a presumption if that questionnaire were sent me and I would throw it in the waste basket, in the first place; and in the second place, gentlemen, I think you are overlooking the basic philosophy of a Grand Jury."
>
> "A petit jury has to be unbiased and to be impartial. A Grand Jury doesn't have to be impartial. In fact, a Grand Jury can start an investigation of its own motion. If it were impartial it couldn't do that.
>
> "The history of the institution of Grand Juries indicate that you may not challenge a Grand Juror for bias as you may a petit juror. Moreover, this indictment was found in May, 1952.
>
> "Let this motion be filed, and denied."

Judge Holtzoff did not suggest that counsel had engaged in any impropriety in sending the questionnaire. The issue concerning the right to a hearing on the showing made was later mooted because of Weinberg's acquittal after trial, but was presented in the *Gold* appeal, now pending in the Court of Appeals.

The letter which petitioner sent to the government-employed grand jurors read as follows:

"Dear (Sir) or (Madam):

I am counsel for the defendant, Mr. Ben Gold, in the above-entitled proceeding. I am writing you and all of the other Federal government employees who sat on the Grand Jury which indicted Mr. Gold. I do this in the interest of the fair administration of criminal justice.

In an effort to learn the effect of the loyalty program on jurors from the Federal government, I ask you please to answer the enclosed questionnaire as objectively as possible and return it to me as soon as possible. I am requesting the other grand jurors who are Federal government employees to do the same. The questionnaire does not seek, and I do not want any information concerning the proceedings or deliberations of the Grand Jury on which you sat.

Answering the questionnaire puts you to some unavoidable trouble. But it is, as you will know, your duty as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case.

A self-addressed stamped envelope is enclosed for your convenience. Promptness in your reply is important, and will be appreciated.

Sincerely,

HAROLD I. CAMMER"

The questionnaire enclosed with the letter was based on *Morford* v. *United States*, *supra*, and *Dennis* v. *United States*, *supra*. It was slightly condensed from the one propounded in *Weinberg* which was patterned after one used in a then recent study of the effect of the loyalty and security programs on government employees (Jahoda

and Cook, *Security Measures and Freedom of Thought: An Exploratory Study of Loyalty and Security Programs*, 61 Yale Law Journal at 331-3; R. 10).

The questionnaire was a necessary prerequisite to an application for a hearing under two existing rulings of the District Court, *United States* v. *Emspak*, 95 F. Supp. 1010, 1012, affd. 203 F. 2d 54 (C. A., D. Col. 1952), rev'd on other grounds, 349 U. S. 190; *United States* v. *Weinberg*, *supra*, in which defendants had been denied hearings because, as the government successfully urged, they had failed, before applying to the court, to conduct their own preliminary investigations of the grand jurors to ascertain whether a basis for a hearing existed. Petitioner had examined the decisions, briefs and records in both these cases in preparation of his contemplated motion (R. 9).

In *Emspak*, the government had urged that the defendant could not move for a hearing unless he had himself first made an attempt to "interview" the individual grand jurors to determine preliminarily whether bias existed in fact. In its *Emspak* brief to the Court of Appeals the government said (pp. 27-8; emphasis supplied):

> "The appellant in this motion was not only asserting that at least eight of the twelve members of the grand jury indicated in this motion were prejudiced and disqualified, but was promising to prove it if given the opportunity; *yet, there is not the slightest indication in the long motion and offer of proof that an attempt has been made to interview a single one of the persons.* Under all the circumstances it is clear that the court acted properly in denying the motion for a hearing. In the absence of any reason for appellant not making his whole showing in the usual form of affidavits, it can be asserted on this review that the trial judge had exclusive discretion to deny a hearing. *The appellant was trying to get the court to make an investigation which the appellant should have made himself.*"

And on November 17, 1952 Judge Kirkland in *Weinberg* had adopted this position and had ruled that there was "nothing to prevent counsel, if he sees fit, contacting those 15 members and inquiring only of one subject, whether or not they had any personal bias toward * * * (defendant) and on that account, did they return the indictment" (R. 14). At the time Judge Kirkland had made this ruling, the *Weinberg* grand jury had not been discharged; at the time that petitioner sent his letter and questionnaire, the *Gold* grand jury had not been discharged.

After petitioner sent the letter and questionnaire he learned that District Judge Pine had questioned the propriety of his doing so. He thereupon made a full report of the matter to Judge Pine (R. 18-22) and later submitted the letter and questionnaire to the Court in support of a motion for a hearing in the *Gold* case (R. 22-23).

Nearly eight months later the government instituted this proceeding. At no time did the government contest petitioner's sworn statement (R. 11) that he had relied in good faith on the foregoing direct precedent, on the suggestion contained in the government's brief in *Emspak*, on the ruling of Judge Kirkland and on the acquiescence of Judge Holtzoff and of the United States attorney in the *Weinberg* case. And in its memorandum to the District Court, the government conceded that there was no intent by petitioner to influence the grand jury and that no such obstruction of justice occurred.[2] Nor did the government dispute that petitioner had no evil intent.

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[2] The government's memorandum to the District Court said (at p. 8):

> "Mr. Cammer disclaims any effort to influence the grand jury. The Government does not charge such an obstruction of justice."

And at page 18:

> "Here it is not charged that Mr. Cammer's conduct amounts to an obstruction of justice in that it amounts to influencing a grand juror under Title 18 § 1503 U. S. C."

In its opinion the District Court stated that "it is not without doubt on the record before the Court, as to whether respondent's acts were committed in conscious wrong." The Court added: "There seems to be reason to believe respondent may have misconceived the proprieties. What he did was open. There was no opprobrious personal approach to jurors. There is indication respondent may have believed he had a right to propound the questions at the time he did, notwithstanding this Court is of opinion he had not" (R. 26).

Nevertheless, the District Court found the petitioner guilty but concluded that "under these circumstances, in the absence of a positive declaration by the Court, it may be unjust to severely punish respondent as otherwise would be required." It thereupon imposed a fine of $100.

The Court of Appeals affirmed, Judge Fahy dissenting. That Court made no mention of the fact that petitioner had followed precedent and the course of action suggested by the government in *Emspak*. It merely made the obscure observation that "appellant set up certain defenses which will not be detailed" (R. 28), and never discussed the validity of those defenses. It held that "it is immaterial whether Cammer was motivated by an evil purpose or not," but, it added, "were we pressed on the point we could readily find that he was" (R. 39). The Court below did not indicate how such a finding could have been made in the face of a record which demonstrated, as the government conceded, the opposite.

Summary of Argument

1. The sending of the questionnaire was not misbehavior; it was a proper preliminary to the motion for a hearing in the *Gold* case.

As defense counsel in a criminal case petitioner had the right to undertake to prove bias of the jurors, whether grand or petit. This included the right to undertake to prove that the effect of the loyalty program impaired the ability of government employees to act without fear in a case involving charges of communism.

Under applicable rulings of this Court, petitioner was required to make a prima facie showing of facts to indicate the existence of bias in the particular case beyond the mere fact of government employment. His actions were necessary and appropriate to that end, particularly in view of the government's successful insistence before the Court of Appeals and the District Court just prior to this case, that a defendant could not apply for a hearing on this issue unless he had himself first "contacted" or "interviewed" the grand jurors to elicit prima facie the existence of such fear or bias.

An attorney's right and duty to engage in such preparation is not affected by a distinction as to whether the grand jury which returned the indictment has been discharged, or is still in session; nor has such a distinction heretofore been indicated. Such a distinction would deprive a defendant of a constitutional right by fortuity if the grand jury were still sitting. Moreover, it would be contrary to precedent. When a grand jury has returned an indictment it is *functus officio* in the particular case even though it may continue to sit as to other cases.

Therefore, where, as here, it is conceded that there was no attempt to influence the grand jury; petitioner's conduct

was not misbehavior, but proper preparation in the discharge of his duty as counsel.

Even if petitioner had no right to send the questionnaire in his obligations to his client, nevertheless he cannot be held guilty of criminal contempt when all he did was to follow in good faith precedent in the same jurisdiction and suggestions made by the government itself.

2. An intent to obstruct justice is an essential and indispensable ingredient of criminal contempt. Such intent must be shown beyond a reasonable doubt. Here the government conceded the absence of such an intent and the District Court did not, and could not, find it. Petitioner should therefore have been acquitted.

3. Petitioner's conduct did not involve an "official transaction" within the meaning of the contempt statute as construed in *Matter of Michael*, 326 U. S. 224, at 228; *Nye* v. *United States*, 313 U. S. 33; *Schmidt* v. *United States*, 124 F. 2d 177 (6th Cir., 1941).

ARGUMENT

I. The mailing of the questionnaire was not misbehavior.

A. The questionnaire was a proper preliminary to the motion for a hearing; in any event petitioner had every reason to believe so.

1. It is always open to a defendant in a criminal case to undertake to prove the existence of bias among the jurors, whether grand or petit. Rule 6(b)(2), Federal Rules of Criminal Procedure. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis* v. *United States*, 339 U. S. 162, 171-2 (1950). "The law permits full inquiry as to actual bias * * *" *United States* v. *Wood*, 299 U. S. 123, 150

(1936). And "for the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *Id.*, at 146.

This Court has further held that the application of these principles requires that, in cases involving charges of communism, interrogation concerning the influence of the loyalty and security programs upon the ability of government employees to act as jurors impartially and without fear is a matter of right, and denial of this opportunity is reversible error. *Morford* v. *United States*, 339 U. S. 258 (1950).

The decision below effectively vitiates, at least in the District of Columbia Circuit, the promise of this Court that "the way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact." *Dennis* v. *United States*, 339 U. S. 162, at 164. See also *Frazier* v. *United States*, 335 U. S. 497 (1948). For, despite repeated efforts and impressive showings, no defendant has yet succeeded in obtaining a hearing on the issue of bias of government-employed grand jurors in the District of Columbia. This failure has been due to the government's successful contention that the defendant may not apply to the Court for a hearing to determine the existence of bias unless he has himself resorted first to self-help by "interviewing" or "contacting" the jurors to determine preliminarily whether bias exists beyond the fact of government employment.

Yet petitioner has been convicted of "misbehavior" because he did the very thing and pursued the only course which the government successfully insisted in *Emspak* and the District Court held in *Weinberg* was not only proper, but was required in order to meet the standards necessary to obtain a hearing.

Thus, if this conviction is sustained, Judge Kirkland's ruling, the acquiescence of the government and of Judge

Holtzoff to the similar questionnaire in *Weinberg*, and the government's brief in *Emspak* have served only as a trap to convict petitioner and to foreclose effectively the only way by which a defendant may, in the District of Columbia, meet the standards necessary to obtain a hearing as to the qualifications of government-employed grand jurors in such a case. If these rulings were to be changed they should not have been changed in a case where a lawyer did no more than to follow judicial rulings and a course urged by the government itself in previous cases as necessary and proper.

2. The criminal code is explicit in prohibiting any communication with a juror, grand or petit, to influence a pending matter. 18 U. S. C. § 1504. But this is not such a case. The government expressly disclaimed a contention that petitioner sought to influence the grand jury (*supra*, p. 7, n. 2) and, further, it has never been thought that inquiry into the legal qualifications of a juror is within this prohibited area.

Furthermore, there is here no issue concerning the propriety of the questions propounded. They were not calculated to and could not influence the deliberations of the jurors, nor did they advert to the merits of any matter under consideration. The District Court based its holding upon the timing of the questionnaire, not upon its content; it found that it did not constitute "an opprobious personal approach to jurors" and that opportunity would "unquestionably" have been afforded if application therefor had been made (R. 25-26). And despite the characterization by the majority below of the propounded questions as "harassing", they constituted no more than normal *voir dire*. *Dennis* v. *United States*, 339 U. S. 162, 170, note 4; *Morford* v. *United States*, *supra*. They were propounded without objection in *Weinberg*, and allowed and put on the *voir dire* of the petit jury in the *Gold* case itself (Trial Transcript, pp. 1a-101a).

Furthermore a contention that the questions were "harassing", apart from being contrary to the *Dennis* and *Morford* holdings, *supra*, would be self-defeating. If the fact of government employment did not affect the qualifications of the grand jurors, as the government would contend, questions concerning the effect of such employment were harmless. And if such employment affected their qualifications, the integrity of the administration of justice required disclosure of the fact. *Frazier* v. *United States*, *supra*; *Wood* v. *United States*, *supra*. Consequently no misbehavior was involved in either the fact or in the form and content of the questionnaire and accompanying letter.

3. The majority below emphasized the fact that on the very day when petitioner had caused the letter and questionnaire to be mailed (from his office in New York) he was appearing before the District Court in the District of Columbia in connection with another motion growing out of the *Gold* case and thus "cast aside an unusually convenient opportunity to consult with the judge about his contemplated action" (R. 34).

But petitioner's appearance on that day created no occasion, convenient or otherwise, to "consult" with the judge about preparatory steps which, under directly applicable rulings of the District Court, petitioner was required to take before he could apply to the court for assistance. We are unaware of any practice which permits defense counsel to consult with or to seek the advice of a judge about such preparatory steps in a pending case. Petitioner had acted responsibly and carefully, by thorough and painstaking research of the decisions, briefs and records in directly applicable cases in the files and library of the court and by consultation with attorneys familiar with the practice in the district who had had similar problems (R. 10-11). Under the existing rulings, which the courts below ignored, petitioner was then in no position to make an application to the court since he had not himself yet

made the necessary "investigation" or "contact" to determine whether the basis for an application to the court existed.

This reliance on the failure to consult because it was "convenient" to do so is misplaced for another reason. If the consent of the court was required, it would have been immaterial that it would have been inconvenient to obtain it. And if the consent of the court was not required, the fact that it could conveniently have been obtained was likewise immaterial. Convenience had nothing to do with the matter since the government's position and the rulings in *Emspak* and *Weinberg* made it inappropriate for petitioner to consult with or to seek a ruling from the court, convenient or not, until his own investigation had been completed. This position and these decisions should not have been suddenly reversed in the context of a conviction for criminal contempt of an attorney who performed a professional obligation in good faith, with proper motive, and in reliance upon recent and exact precedents the validity of which had not theretofore been questioned. If "consultation" with the trial court was a prerequisite to the inquiry, petitioner had no way of suspecting that fact. No one had made a point of it before and the government's brief in *Emspak* had not referred to the necessity for such a preliminary. The belated application of the principle resulted in entrapping petitioner.

B. It is immaterial that the grand jury had not been discharged at the time that the questionnaire was sent.

The courts below emphasized the fact that the grand jury had not been discharged when the questionnaire was sent (R. 26, 34-5). But in *Weinberg*, upon which petitioner based his actions, the grand jury had not been discharged at the time when Judge Kirkland upheld the government's contention that the defendant had to resort to self-help before applying to the court, and had ruled that there "is

nothing to prevent" defense counsel from "contacting" the grand jurors to inquire as to the existence of bias. The *Hoxsey* grand jury was discharged several months after this ruling was made.

Moreover, this case does not arise under 18 U. S. C. 1504 which forbids an attempt by writing to influence a grand or petit juror in any "pending" matter. Interrogation of a juror to determine his qualifications is not within that section and the government admits that petitioner has not done anything to bring him within it.

Furthermore a challenge to the qualifications of a grand juror must be presented while the matter or issue is still pending; otherwise it is too late. *Cf. Michel* v. *Louisiana* (No. 32) and *Porter et ux.* v. *Louisiana* (No. 26), ——— U. S. ———, December 5, 1955, Oct. Term, 1955. Rule 6(b)(1) of the Federal Rules of Criminal Procedure provides for a challenge before the oath is administered; Rule 6(b)(2) provides for such a challenge after an indictment has been returned; and there is no doubt but that such a challenge may, and, if the facts justifying it are known, must be made while the grand jury is sitting and before it has returned the indictment. *Crowley* v. *United States*, 194 U. S. 461, 469-73 (1904); *United States* v. *Herzig*, 26 F. 2d 487 (D. C., S. D. N. Y. 1928). See *United States* v. *Gale*, 109 U. S. 65 (1883) and annotation at 27 L. ed. 857. Indeed, it is settled that such a challenge must be made *in limine*. *United States* v. *Gale*, *supra*; *Burchett* v. *United States*, 134 F. 2d 821 (4th Cir., 1912); *Wright* v. *United States*, 165 F. 2d 405 (8th Cir., 1918); *Redmon* v. *Squier*, 162 F. 2d 195 (9th Cir., 1947).

Since questions designed only to probe the existence of bias are entirely proper (*cf. Duke* v. *United States*, 90 F. 2d 840 (4th Cir., 1937)), it must follow that the fact that the grand jury is still sitting can have no effect upon the defendant's right to explore the facts. Otherwise a defend-

an indicted towards the end of a grand jury term would have the right to explore for the purpose of adducing facts in support of his challenge while another defendant, fortuitously indicted early in the term, would be denied this right because the grand jury had not been discharged. Since grand juries may sit for eighteen months, the right to present a challenge would in such a case be effectively nullified. For on the one hand the government has successfully contended in the District of Columbia circuit that the defendant is first obliged himself to interview or contact the jurors to determine whether a basis for the challenge exists, and on the other the defendant is faced with the necessity of filing the challenge before arraignment.[3]

Nor can the test turn on the speculation in the defendant's mind as to whether the grand jury, having returned an indictment, is through with him or may still be considering the possibility of further indictments. To allow the right to explore in the one case but not in the other, particularly in view of the required secrecy of grand jury proceedings, is too tenuous and subjective a test to be considered. Moreover, the prosecutor could thereby always effectively preclude a lawful inquiry by hinting at the possibility either of additional or of superseding indictments.

Thus the asserted distinction has no basis in reason. Moreover, as noted, it is contra to the direct precedent in *Vinberg* and no suggestion that such a distinction is significant can be discerned from the unqualified position

[3] In the District of Columbia, by local court rules, the challenge to the grand jury may be made within ten days after arraignment or within such additional period as the Court may grant for motions. In the *Gold* case the trial court granted counsel thirty days to file motions. This time was subsequently extended. If the motion had not been filed within the time allotted by the Court, it would have been too late. The deadline for filing expired while the grand jury was still in session.

taken by the government in *Kinsella* that counsel was not entitled to seek assistance from the Court unless counsel first, by their own efforts, established a likelihood of bias by interrogating the grand jurors.

Finally the letter in issue was confined only to the matter concerning which the grand jury had returned the indictment. It was not concerned with, and did not refer to, any other matter which the grand jury might have had under consideration. As to the matter in which an indictment had been returned, the function of the grand jury was exhausted as though it had been discharged, and even though sitting it had no further concern with or interest in it. See *In re Oliver*, 333 U. S. 257, at 265 (1948). See also *In re National Window Glass Workers*, 287 Fed. 219 (1922); *Norcross v. United States*, 203 Fed. 13 (9th Cir., 1913).

Finally, it is true as to this point as well as on the suggestion of prior "consultation" with the trial judge that if the questioning was permissible only if the grand jury had been discharged, petitioner had no way of knowing of this distinction, which had not been articulated in the precedents on which petitioner had relied.

II. Petitioner was not guilty of criminal contempt since there was here wholly absent, and the District Court did not find, an intent to obstruct justice or an obstruction of justice.

In view of the petitioner's uncontradicted denials, the government's concession, and the District Court's failure to find, that an obstruction of justice occurred or was intended, or that there was any effort to influence the grand jury, appellant should have been acquitted without regard to whether the questionnaire was proper or his conduct "misbehavior".

The underlying premise of any contempt proceeding is an obstruction of justice and this essential element "must clearly be shown in every case where the power to punish for contempt is exerted." *Matter of Michael*, 326 U. S. 224, at 228 (1945), citing *Ex parte Hudgings*, 249 U. S. 378 (1919). Further criminal intent is a material and essential ingredient of the crime of criminal contempt. *Indianapolis Water Co. v. American Strawboard Co.*, 75 F. 972 (C. D. Ind. 1896); *United States v. Univis Lens Co.*, 88 F. Supp. 809 (D. C. S. D. N. Y. 1950). Such intent must be established beyond a reasonable doubt. As to the necessity of proof beyond a reasonable doubt of every essential ingredient of the offense, and the evidentiary force to be given to the presumption of innocence in such a case, see also *Blim v. United States*, 68 F. 2d 484, at 487 (7th Cir., 1934), citing *Jones v. United States*, 209 F. 585, 587 (7th Cir., 1913); *In re Michael*, 146 F. 2d 627, 628, footnote 2 (3d Cir.) reversed on other grounds, 326 U. S. 224.

> "Guilt in a criminal contempt must be established beyond a reasonable doubt. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 S. Ct. 492, 55 L. ed. 797, 34 L. R. A., N. S. 874. Once established the penalty of such a judgment against an attorney is long-lived.
>
> "It does not cease with the payment of the fine or with the discharge of a jail-sentence, but, being inherent in the judgment, may arise to confront him throughout his professional career." *Schmidt v. United States*, 115 F. 2d 394, at 398 (6th Cir., 1940); see same case also at 124 F. 2d 177 (6th Cir., 1941).

Yet here the District Court expressly found that it was in doubt as to an essential element of the offense.

No basis for a finding of criminal intent exists in this case. Nor was it or could it be suggested that appellant

acted defiantly or out of a spirit of resistance, or even negligently or indifferently to his duty as an officer of the Court. *Cf. United States v. Ford*, 9 F. 2d 990 (D. C. Mont. 1925). On the contrary, his actions were consistent with the highest standards of professional care; they were based on convincing authority in this Court (*Frazier*, *Wood*, *Dennis* and *Morford*), as well as in the District Court, on study of the briefs and records in *Emspak* and *Weinberg*, and on consultation with other attorneys who had worked in the field (R. 10).[4]

Apart from the conclusory allegation in the moving petition that petitioner's conduct was in violation of 18 U. S. C. 401(2), no order, decision, statute or rule of practice was referred to by the government or by the courts below to diminish the force of the rulings discussed in Point I, nor to explain the inconsistency of the government's position in its brief in *Emspak* and its argument before Judge Kirkland on the one hand and the position advanced by it in this proceeding on the other. Indeed the District Court referred to the "absence of a positive declaration by the Court" to offset the effect of this body of law.

If lawyers may not act on the authority of a line of cases in this Court consistently and steadfastly adhered

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[4] It is appropriate to observe that at the conclusion of the *Gold* case, Judge McLaughlin who had presided at the trial, commented on the high professional standards observed and the care and thoroughness with which defense counsel had conducted the defense as follows (Gold transcript for April 27, 1954, p. 70):

> "This case consumed, as counsel knows a period of six weeks in trial. It was a very vigorously contested case, one in which counsel on both sides expertly represented their respective clients. And the Court is not aware of another case in which the Court has participated in which every conceivable question was more carefully raised, and rulings thereon more carefully preserved in the record. The Court can do no less than commend counsel for their zeal in their representation of their respective clients."

to, upon the government's own interpretation of the action required under those cases, upon District Court rulings based thereon, and upon the practice of members of the bar consistent therewith, except under peril of a conviction for contempt upon a sudden reversal of the authorities in the contempt proceeding itself, how can they act at all? The observation of Mr. Chief Justice Fuller in *Matter of Watts*, 190 U. S. 1, at 35 (1903) that "the fearless discharge of their duty by [the gentlemen of the bar] should not be shaken by liability to punishment for mere errors of judgment in rendering such assistance" is especially appropriate in the context of this case.

There was no criminal intent in this case; thus even if the questionnaire were improper, no conviction for contempt was justified in view of the District Court's express finding of a reasonable doubt as to the existence of such an intent.

The conviction of petitioner under the circumstances can only serve to intimidate the bar in the exercise of its function to defend accused persons zealously. It is particularly unfortunate in this regard that petitioner's conviction occurred as a result of his representation of a person accused of being a Communist. Surely the bar can infer, not without reason in view of the District Court's opinion [5] and the readiness of the court below to find an evil motivation "if pressed" (R. 39) that this case proves the danger to attorneys of representing unpopular defendants.

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[5] Nothing has changed its understanding that whenever a case is pending before judge or jury, no pressure or harassment of any character should be exercised on one who must make a decision. Unfortunately within late years there has been a tendency to bring such pressures and harassment. For a time, there was picketing of courts during trials. Then there came about unseemly conduct of counsel in court, requiring disciplining of counsel. Now it appears searching questionnaires have been submitted to grand jurors while they are

III. In any event, petitioner's conduct did not involve an "official transaction" within the meaning of the contempt statute.

Assuming *arguendo* that petitioner's conduct was "misbehavior", and that an intent to obstruct justice was established beyond a reasonable doubt, the test of an "official transaction" adopted by the majority below was erroneous.

The majority below, on the authority of *Ex parte Bradley*, 7 Wall at 374 (1868) made the test of "official transaction" turn on whether the "actions occurred when he was directly engaged 'in the practice of the profession'." This vague test, extracted from a case where an attorney assaulted a judge in the courtroom, is erroneous, as Judge Fahy points out in his dissent, because it conflicts with the narrow meaning which this Court has accorded to that phrase in *In re Michael*, 326 U. S. 224, at 229, and to the holdings of the First and Sixth Circuits in *Farese* v. *United States*, 209 F. 2d 312, at 315 (1st Cir., 1954), and *Schmidt* v. *United States*, 124 F. 2d 394 (6th Cir., 1941).

Furthermore, the emphasis by the majority upon *Sinclair* v. *United States*, 279 U. S. 749 (1929); *Ex parte Bradley, supra*, and *Tanner* v. *United States*, 62 F. 2d 601 (10th Cir., 1933) implies vitality in a series of cases bottomed on the "reasonable tendency" rule expressed in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402 (1918). But the "reasonable tendency" rule was firmly overruled by *Nye* v. *United States*, 313 U. S. 33 (1941), where this Court held that the contempt statute was intended as "a drastic delimitation" upon the power of the courts to punish for crime without indictment or the right to trial by jury. *Ibid.*, at 45-46. "It is not sufficient that the misbehavior charged has some direct relation to the work of the court * * * In view of the history of these provisions, meticulous regard for these separate categories of offenses must be had so that the instances where there is no right

to jury trial will be narrowly restricted." *Ibid.*, at 49. See also *Ex parte Terry*, 128 U. S. 289 (1888); *Cooke* v. *United States*, 267 U. S. 517 (1925). Since *Nye* this Court has consistently reaffirmed the view that the contempt statute is to be construed most narrowly. *In re Michael*, 326 U. S. 224, 227 (1945). See also *In re Oliver*, 333 U. S. 257, 274-5 (1948); *Craig* v. *Harney*, 331 U. S. 367, 372 (1947); *Pennekamp* v *Florida*, 328 U. S. 331, 334 (1946); *Bridges* v. *California*, 314 U. S. 252, 261 (1941).

Thus, *Sinclair*, although entirely distinguishable on the facts, expressly rested on the *Toledo* rule which *Nye* overruled. The dicta in *Ex parte Bradley* is of questionable validity in the light of *Nye*; and *Tanner*, where an attorney, in the courthouse berated a juror because he had rendered an inadequate verdict, was decided eight years before *Nye*. *Cf. In re Michael*, 326 U. S. 224 (an attorney-trustee in bankruptcy testifying falsely before the grand jury concerning the bankrupt estate is not engaged in an "official transaction"); *Farese* v. *United States*, 209 F. 2d 312 (1st Cir., 1954) (an attorney who in a courthouse corridor tried to corrupt a witness in a case on trial was not engaged in an "official transaction.") and *Schmidt* v. *United States*, 124 F. 2d 177 (6th Cir., 1941), see also same case at 115 F. 2d 394 (1940).

The effect of *Nye* is decisively illustrated by the two decisions in *Schmidt*, *supra*. There the defendant was an attorney in a mail fraud case. With knowledge that the grand jury had not been discharged, and in disregard of the oath of secrecy of the grand jurors, he had his client induce some of the grand jurors to disclose the proceedings and deliberations of the grand jury which had resulted in the indictment and to make affidavits respecting these matters. He then filed the affidavits in support of a motion to quash the indictment. He was convicted of contempt "for filing these affidavits contrary to and in violation of the oath of said grand jurors, without application to or per-

mission from the Court at the time when the grand jurors were subject to recall and had not been discharged." The Sixth Circuit, although it held that his conduct constituted contempt, reversed the conviction for an irregularity in the proceedings. 115 F. 2d 394. He was again convicted. In the interim *Nye* was decided. The Sixth Circuit again reversed, but this time on the ground that the conduct involved was not in an "official transaction" with the Court, nor did it occur within the Court's presence or so near thereto as to fall within the statute. 124 F. 2d at 177.[6]

Cases involving corrupt or improper dealing with the Court itself, such as the presentation of documents known to be forged (*United States* v. *Ford*, 9 F. 2d 990 [D. C. Mont. 1925]; *In re Steiner*, 195 Fed. 299 [D. C. S. D. N. Y. 1912]) or presenting a false answer with knowledge of its falsity (*United States* v. *Frank*, 53 F. 2d 128 [D. C. N. J. 1931]); or disrespect towards or misconduct in the presence of the Court (*United States* v. *Landes*, 97 F. 2d 378 [2d Cir., 1938]; *Cooke* v. *United States*, *supra*), and the like, are clearly distinguishable. They involve subdivisions (1) and (3) of Section 401 or are direct misconduct vis-a-vis the Court. This distinction is made plain in *Matter of Michajl*, 326 U. S. 224. Therefore the proceeding should have been dismissed for the separate reason that petitioner's conduct was not in an "official transaction" within the meaning of the statute.

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[6] The Court below erroneously read *Schmidt* as "primarily" concerned with the first rather than the second subsection of 18 U. S. C. § 401 (R. 53). Examination of the decision will disclose that the Court placed no emphasis on the first subsection over the second.

Conclusion

The conviction was unwarranted. Petitioner's conduct was not improper. No contempt was intended or committed. In any case, his conduct was not within the meaning of the statute. The conviction of petitioner is a manifest injustice, endangers the right of proper representation, and compromises the administration of justice. The judgment appealed from should therefore be reversed with direction to the District Court to dismiss the proceeding below.

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Respectfully submitted,

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